

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:)
)
RED TOP RENTALS, INC.) CAUSE NO: 09-05229-JKC-11
)
)
DEBTOR.)
)
_____)

**MOTION TO REJECT UNEXPIRED LEASE
WITH MARLIN LEASING**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

Red Top Rentals, Inc., the debtor and debtor-in-possession (the “Debtor”), by counsel, in support of the above-entitled motion (this “Motion”), and respectfully states:

1. Since the Petition Date, the Debtor has continued in the possession of their property pursuant to §§ 1107 and 1108 of the Bankruptcy Code, codified at 11 U.S.C. §101, *et seq.* (the “Code”), and is a debtor-in-possession. A creditors committee has not been appointed in this case.

2. The Court has jurisdiction over this application pursuant to 28 U.S.C. §157 and 1334. Venue is proper pursuant to 28 U.S.C. §1408 and 1409. This application is a core proceeding pursuant to 28 U.S.C. §157(b)(2). The statutory predicates for the relief requested herein are 11 U.S.C. §365 and Fed. R. Bankr. P. 6006.

3. Prior to the Petition Date, the Debtor, in its normal course of business, entered into a lease agreement with Marlin Leasing (the “Lease”). Attached as **Attachment A** is a copy of the Lease.

4. The Lease is for the lease of a Konica 7222 digital copier and a Sharp 525 facsimile. The Lease appears to be still be executory and appears to expire on or around July 19, 2009.

5. Assignment of the Lease is not deemed by the Debtor to have any value.

6. The Debtor has no further need to lease the fax machine. The Debtor is keeping another copier, which includes a facsimile, for a total rental price of \$320.00 per month. The contract for the lease of the Konica 7222 digital copier and Sharp 525 facsimile does not include a copier machine and costs approximately \$265.00 per month in rent. The Lease is a burden on the Debtor and is not a source of potential value for this estate.

7. Section 365(a) of the Bankruptcy Code provides that a debtor-in-possession, “subject to the court’s approval, [may] assume or reject any executory contract or unexpired lease.” See In re FBI Distribution Corp., 330 F.3d 36, 42 (1st Cir. 2003); University Medical Center v. Sullivan (In re University Medical Center), 973 F.2d 1065, 1075 (3d Cir. 1992). The assumption or rejection of an unexpired lease by a debtor is subject to review under the business judgment standard. In the Matter of Federated Dept. Stores, Inc., 131 B.R. 808, 811 (S.D. Ohio 1991) (“Courts traditionally have applied the business judgment standard in determining whether to authorize the rejection of executory contracts and unexpired leases.”). This standard is satisfied when the debtor determines that rejection will benefit the estate. Commercial Fin., Ltd. v. Hawaii Dimensions, Inc. (In re Hawaii Dimensions, Inc.), 47 B.R. 425, 427 (D. Haw. 1985) (“Under the business judgment test, a court should approve a debtor’s proposed rejection if such rejection will benefit the estate.”) (citation omitted).

8. If the debtor’s business judgment has been reasonably exercised, a court should approve the assumption or rejection of an unexpired lease. See, e.g., NLRB v. Bildisco and

Bildisco, 465 U.S. 513, 523 (1984); Group of Institutional Investors v. Chicago, M., St. P. & P.R. Co., 318 U.S. 523, 550 (1943); Sharon Steel Corp. v. National Fuel Gas Distribution Corp., 872 F.2d 36, 39-40 (3d Cir. 1989); In the Matter of Goldblatt Bros., Inc., 766 F.2d 1136, 1139 (7th Cir. 1985).

9. In applying the “business judgment” standard, courts show great deference to the debtor’s decision to reject. See Summit Land Co. v. Allen (In re Summit Land Co.), 13 B.R. 310, 315 (Bankr. D. Utah 1981) (absent extraordinary circumstances, court approval of a debtor’s decision to assume or reject an executory contract “should be granted as a matter of course”).

10. The Debtor clearly satisfies the “business judgment” standard in rejecting the Lease. As explained above, the Lease is not a source of potential value for the estate. Accordingly, the Debtor has determined that, in the sound exercise of their business judgment, the Lease should be rejected and such rejection will benefit the Debtor’s estates.

Request for Relief

The Debtor respectfully requests that the Court grant this Motion and grant such other and further relief as is just and proper.

Respectfully submitted,

TUCKER | HESTER, LLC

/s/ Jeffrey M. Hester
Jeffrey M. Hester

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EQUIPMENT LEASE CONTRACT FOR LEASES UNDER \$50,000

Leasing Company ("Lessor" or "Us"): Marlin Leasing Corporation

www.marlinleasing.com

Northeastern Division • 300 Fellowship Road • Mount Laurel, NJ 08054 • phone: 888.479.9111 • fax: 888.479.1100
Lease Acceptance Office • 520 Walnut Street, Suite 1150 • Philadelphia, PA 19106 • phone: 800.479.9111 • fax: 800.303.9545

DESCRIPTION OF LEASED EQUIPMENT (Include quantity, make, model, serial number and accessories. Attach schedule if necessary.) **MUST BE COMPLETED**

Kenica 7222 Digital Copier, HP Laser, Printer, EP424, low unit
Alario 60-De 535 Facsimile

LEASING CUSTOMER ("YOU")

Company Name (Exact business name): Red Top Rentals Inc.
Address: 5985 Stockburger Place Indianapolis IND 46241
City State Zip
Phone: 317-247-8300 Fax: 317-247-1133 Corp. Limited Liability Corp. Partnership Proprietorship
Equipment Location: _____ State of Incorporation/Organization: _____

Vendor: BERDEN Business Systems Address: 9430 Purvitz Way W. De Underapalis PA 16240

Lease Term (Mos.)	Total No. of Payments	Amount of Each Payment	Security Deposit	Payment Frequency
<u>48</u>	<u>48</u>	<u>\$ 265.00</u> <small>(plus applicable taxes)</small>	<u>\$ 0</u>	<input checked="" type="checkbox"/> Monthly <input type="checkbox"/> Quarterly

TERMS OF LEASE

1. You (the customer) want to acquire the above equipment from the above vendor. You want (the leasing company) to buy it and then lease it to you. This Lease will begin when the equipment is delivered to you and will continue for the entire Lease Term plus any interim period. You will unconditionally pay us all amounts due, without any right to set-off. If we do not receive your payment by its due date, there will be a late fee equal to the greater of \$20.00 or 15% of the late amount (or, if less, the maximum amount allowable under law) which you agree is a reasonable estimate of the costs we incur with respect to late payments and is not a penalty. Upon your request, we will waive the first assessed late charge. We may charge you a partial payment (interim rent) for the time between delivery and the due date for the first regular payment. We may charge you a one-time documentation fee up to \$100. You agree that we may adjust the payment amount above if the final equipment cost varies from the amount the payment was based upon. This Lease is not binding on us until we sign it. To expedite this Lease, you asked us to accept your faxed signature and have agreed it will be considered as good as your original signature and admissible in court as conclusive evidence of this Lease.

2. (a) Unless we have given you a written option to buy the equipment at the end of the Lease Term for \$1.00, you must notify us by certified mail between 90 and 180 days prior to the end of the Lease Term if you intend on returning the equipment. If you do not notify us, the Lease will automatically extend for 12 months under the same terms and conditions. If you give us the proper notice, then at the end of the Lease Term you shall return the equipment in good working order in a manner and to a location designated by us. You agree to reimburse us for our costs to refurbish returned equipment. (b) You agree the security deposit will not bear interest and that we may apply it to any amount owed to us, and should we do so, you agree to restore the security deposit to its original amount. You may request the return of the security deposit only after all of your obligations under this Lease have been met in full.

3. You alone selected the vendor and the equipment. You asked us to buy it. We are not related to the vendor and we cannot get a refund, nor is the vendor allowed to waive or modify any term of this Lease. Therefore, the Lease cannot be canceled by you for any reason, even if the equipment fails or is damaged and it is not your fault. We are leasing it to you "as is" and we disclaim all express and implied warranties, including any warranty of merchantability or fitness for a particular purpose. You are responsible for all service. The vendor may have given you warranties. You may contact the vendor to get a statement of those warranties, if any. We assign to you any warranties the vendor may have given us. You shall settle any dispute regarding the equipment's performance directly with the vendor. You promise that the equipment will be used only for business and not for personal, family or household purposes. You will keep and use the equipment only at the above address and not move it or return it to us prior to the end of the Lease Term.

4. If you do not pay us as agreed or fail to perform any other term of this Lease, you will be in default and you agree that we may (i) repossess the equipment and/or (ii) directly

debit (charge) your bank account(s) and/or sue you for all past due payments and other charges and all payments due in the future to the end of the Lease Term, plus our legal and collection costs. If you are in default and/or do not meet your end of term obligations, we may also directly debit and/or sue you for the "residual" (end of term) equipment value. This Lease shall be governed by the laws of the Commonwealth of Pennsylvania (where we have an office and accepted this Lease). You agree that any suit relating to this Lease shall be brought only in a state or federal court in Pennsylvania, and you irrevocably consent and submit to the jurisdiction of such courts. Each party waives any right to a jury trial. We will have title to the equipment at all times. This is a "true lease" and not a loan or installment sale. You grant us a first priority security interest in the equipment and authorize us to file the Uniform Commercial Code ("UCC") financing statements (in case this is later determined not to be a "true lease"). You agree this is a "finance lease" under Article 2A of the UCC. You waive all UCC rights and remedies you may have, including those in Sections 2A-508 through 2A-522.

5. You must pay us for all sales, use, property and other taxes (and any penalties) relating to the Lease and the equipment. We may adjust this Lease and the payment above to finance for you any taxes due at Lease inception. We may bill you based on our estimate of the taxes. We may charge you an annual property tax administration fee up to \$15. Unless we have given you a written option to buy the equipment at the end of the Lease Term for \$1.00, we will be entitled to all tax benefits, if you do anything to disallow our getting these benefits. You will promptly indemnify (pay) us an equivalent amount. If we gave you a \$1.00 purchase option, we may require you to file all personal property tax returns. You accept all risks of loss, injury or damage caused by the equipment and shall indemnify us for all suits and other liabilities arising from the same. This indemnity will continue even after the Lease has ended. You must maintain acceptable public liability insurance naming us as "additional insured". You must keep the equipment insured against all risks of loss in an amount equal to the replacement cost and have us listed on the policy as "loss payee." If you do not give us proof of the property insurance within 30 days after the Lease commences, then depending on the original equipment cost we may either (i) obtain property insurance to cover our interests and charge you a fee for such coverage (including a monthly administration fee and a profit to us) or (ii) charge you a monthly non-compliance fee up to \$50 (which provides no insurance benefit). You can cancel the insurance coverage fee or non-compliance fee at any time by delivering the required proof of insurance.

6. Since this Lease is based on your own credit rating, you may not assign (transfer) the Lease to anyone else. We may sell or transfer our interests to another entity, who will then have all of our rights but none of our obligations. Those obligations will continue to be ours. The rights we pass on to the new entity will not be subject to any defenses, claims or set-offs you may assert against us. Any action by you against us must be commenced within one year after the cause of action arises or be forever barred.

ACCEPTANCE OF LEASE AGREEMENT THIS IS A BINDING CONTRACT. IT CANNOT BE CANCELED. READ IT CAREFULLY BEFORE SIGNING, AND CALL US IF YOU HAVE ANY QUESTIONS.

X Signature of Leasing Customer: JOHN E. DAVEN II VP. 7-19-05
Print Name of Signer Title Date

X Accepted and Signed by MARLIN LEASING CORP. _____
Print Name of Signer Title Date

PERSONAL GUARANTEE

I HEREBY PERSONALLY AND UNCONDITIONALLY GUARANTEE ALL AMOUNTS OWED BY THE LEASING CUSTOMER UNDER THIS LEASE. I AGREE THAT THE LEASING COMPANY MAY EXTEND, TRANSFER AND AMEND THE LEASE AND I AGREE TO BE BOUND BY ALL SUCH CHANGES. I WAIVE ALL NOTICES, INCLUDING NOTICES OF DEMAND AND DEFAULT. I AGREE THE LEASING COMPANY MAY PROCEED AGAINST ME SEPARATELY FROM THE LEASING CUSTOMER. I HAVE AUTHORIZED THE LEASING COMPANY OR ITS DESIGNEE TO USE MY CONSUMER CREDIT REPORTS FROM TIME TO TIME IN ITS CREDIT EVALUATION AND COLLECTION PROCESSES. I AGREE THAT ANY SUIT RELATING TO THIS LEASE SHALL BE BROUGHT ONLY IN A STATE OR FEDERAL COURT IN PENNSYLVANIA AND I IRREVOCABLY CONSENT AND SUBMIT TO THE JURISDICTION OF SUCH COURTS, AND I WAIVE TRIAL BY JURY.

X GUARANTOR #1 (Print Name) _____
Signature (Individually, No Titles) Date

X GUARANTOR #2 (Print Name) _____
Signature (Individually, No Titles) Date

ACCEPTANCE OF DELIVERY

I AM AUTHORIZED TO SIGN THIS CERTIFICATE ON BEHALF OF THE LEASING CUSTOMER. I CERTIFY TO THE LEASING COMPANY THAT THE EQUIPMENT HAS BEEN DELIVERED AND IS FULLY INSTALLED AND WORKING PROPERLY. I AUTHORIZE THE LEASING COMPANY TO PAY THE VENDOR AND COMMENCE THE LEASE.

X Authorized Signature _____ Name and Title (Please Print) _____ Equipment Delivery Date _____
2002N-PA-R0304